Guideline Sentencing Update

a publication of the Federal Judicial Center *volume 7, number 7, April 21, 1995*

Violation of Probation and Supervised Release

Seventh Circuit overrules *Lewis*, holds that Chapter 7 policy statements are not binding. In *U.S. v. Lewis*, 998 F.2d 497 (7th Cir. 1993), the Seventh Circuit held that all policy statements—including those in Chapter 7—are binding on district courts unless they contradict a statute or guideline. However, after reevaluating Supreme Court precedent and noting that every other circuit to decide the issue has held that Chapter 7 is not binding, the court overruled *Lewis*. "The policy statements in Chapter 7 . . . are neither Guidelines nor interpretations of Guidelines. They tell the district judge how to exercise his discretion in the area left open by the Guidelines and the interpretive commentary on the Guidelines. Such policy statements are entitled to great weight because the Sentencing Commission is the expert body on federal sentencing, but they do not bind the sentencing judge. Although they are an element in his exercise of discretion and it would be an abuse of discretion for him to ignore them, they do not replace that discretion by a rule."

U.S. v. Hill, 48 F.3d 228, 230–32 (7th Cir. 1995).

See *Outline* at VII.

Offense Conduct

Mandatory Minimums

Third, Sixth, and Seventh Circuits hold that amended guideline method for calculating the weight of LSD does not apply retroactively to calculation for mandatory minimums; Ninth Circuit holds that it does. The Third, Sixth, and en banc Seventh Circuits all affirmed district court refusals to apply retroactively the guideline amendments for calculating LSD weight, *see* §2D1.1(c) at n.* and comment. (n.18 and backg'd), to the calculation of LSD amounts for mandatory minimum sentences. The courts concluded that *Chapman v. U.S.*, 500 U.S. 453 (1991), still applies and the weight of the LSD and its carrier medium should be used for mandatory minimum purposes.

U.S. v. Hanlin, 48 F.3d 121, 124–25 (3d Cir. 1995); *U.S. v. Andress*, 47 F.3d 839, 841 (6th Cir. 1995) (per curiam); *U.S. v. Neal*, 46 F.3d 1405, 1408–11 (7th Cir. 1995) (en banc) (three judges dissenting). *See also* summary of *Pardue* in 7 *GSU* #4.

The Ninth Circuit, however, held that the amended guideline method should be used for mandatory minimum calculations. The court found persuasive the reasoning in *U.S. v. Stoneking*, 34 F.3d 651 (8th Cir. 1994) [7 *GSU* #3], although it acknowledged that *Stoneking* was vacated for rehearing en banc. "It is our belief that the assignment of a uniform and rational weight to LSD on a carrier medium does not conflict with *Chapman*. . . . Rather than 'overriding' *Chapman*'s interpretation of 'mixture or substance,' the formula set forth in Amendment 488 merely standardizes the amount of carrier medium that can be properly viewed as 'mixed' with the pure drug."

U.S. v. Muschik, No. 93-30461 (9th Cir. Feb. 28, 1995) (Wood, Sr. J.) (remanded).

See *Outline* at II.A.3 and II.B.1.

Calculating Weight of Drugs

Ninth Circuit holds that the one kilogram per plant conversion ratio for marijuana is not limited to seizures of live plants. Defendant pled guilty to manufacturing and possessing with intent to distribute "at least one hundred marijuana plants." She admitted growing and harvesting the marijuana, but argued that the sentence should be based on the 10–20 kilograms of dried marijuana that was actually harvested from the plants. The district court found that defendant had grown and harvested at least one hundred marijuana plants and based her offense level on the one plant equals one kilogram ratio in §2D1.1(c) at n.* ("In the case of an offense involving marijuana plants, if the offense involved (A) 50 or more marijuana plants, treat each plant as equivalent to 1 KG of marijuana . . . ").

The appellate court affirmed, holding that the kilogram conversion ratio may be applied to a grower when live plants were not actually seized but there is sufficient evidence to prove the number of plants involved. The court noted that its decision in *U.S. v. Corley*, 909 F.2d 359 (9th Cir. 1990), indicating that the ratio should be used only when live plants are seized, was based on earlier versions of the Guidelines and 21 U.S.C. §841(b). The Guidelines were changed in Nov. 1989 after §841(b) was amended to increase its ratio from 100 grams per plant to one kilogram per plant for more than fifty plants. The Ninth Circuit has "explained that Congress did not introduce the one kilogram conver-

sion ratio because that quantity provided any evidentiary 'estimate' of the potential yield of a marijuana plant . . . . Congress imposed that conversion ratio because it provided a degree of punishment determined appropriate for producers of 50 or more marijuana plants." Following this "underlying purpose behind the one kilogram conversion ratio," the court held "that the one kilogram conversion ratio applies even when live plants are not seized. . . . When sufficient evidence establishes that defendant actually grew and was in possession of live plants, then conviction and sentencing can be based on evidence of live plants. The fact that those plants were eventually harvested, processed, sold, and consumed does not transform the nature of the evidence upon which sentencing is based into processed marijuana."

U.S. v. Wegner, 46 F.3d 924, 925–28 (9th Cir. 1995). *Accord U.S. v. Haynes,* 969 F.2d 569, 571–72 (7th Cir. 1992). Other circuits have held that the kilogram equivalence is limited to live plants. *See U.S. v. Stevens,* 25 F.3d 318, 321–23 (6th Cir. 1994); *U.S. v. Blume,* 967 F.2d 45, 49–50 (2d Cir. 1992); *U.S. v. Osburn,* 955 F.2d 1500, 1509 (11th Cir. 1992).

See *Outline* at II.B.2.

General Application

Sentencing Factors

Second Circuit holds that Guidelines are mandatory. Without notice to the government or findings based on the Guidelines, the district court departed downward from defendants' guideline ranges, concluding that "the Guidelines are one of several factors to be considered in imposing sentence, and are not necessarily controlling. . . . [T]he court determined that, in the case before it, the Sentencing Guidelines did not govern because the 24 to 30 month range was 'greater than necessary' to achieve general punishment purposes as that phrase is used in 18 U.S.C. §3553(a). The court therefore imposed lesser sentences, noting without findings or particulars that the 'sentences imposed would be appropriate' even if the Guidelines were, in fact, binding."

The appellate court remanded. "Notwithstanding that the Guidelines appear to be but one of several factors to be considered by a sentencing court, the statute goes on to say that the court 'shall impose a sentence of the kind, and within the [Guidelines] range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission. . . .' 18 U.S.C. §3553(b). Thus, although subsection (a) fails to assign controlling weight to the Guidelines, subsection (b) does so. . . . We hold that section 3553 requires a court to sentence within the applicable Guidelines range unless a departure, as that term has come to be understood, is appropriate." The court remanded for consideration of whether "permissible bases for downward departure exist."

U.S. v. DeRiggi, 45 F.3d 713, 716–19 (2d Cir. 1995).

See *Outline* at I.C.

Departures

Substantial Assistance

Eighth Circuit holds that government may, within limits, apply substantial assistance motion to only some of defendants' multiple mandatory minimum sentences. Defendants were each subject to three mandatory minimum sentences for drug and weapons offenses. The government filed substantial assistance motions under §5K1.1 and 18 U.S.C. §3553(e), but limited the §3553(e) motions to only one of the mandatory minimums for each defendant. The district court accepted this limitation as valid and sentenced defendants accordingly.

The appellate court agreed that the government could so limit its §3553(e) motion. "The issue before us is whether the term 'a sentence' in §3553(e) refers to each offense of conviction when multiple mandatory minimums are involved, or to the total sentence imposed by reason of the conviction. Although the word 'sentence' is not defined in Chapter 227 of the Criminal Code (18 U.S.C. §§ 3551–3586) . . . numerous provisions in that Chapter make it clear that 'a sentence' is imposed for each offense of conviction. . . . Likewise, the Guidelines recognize that each offense in a multicount conviction receives a separate sentence, even though many counts may be grouped or sentenced concurrently in determining the total Guidelines prison sentence. . . . Thus, we conclude that the plain language of §3553(e) authorizes the government to make a separate substantial assistance motion decision for each mandatory minimum sentence to which a defendant is subject."

However, the government may not limit its motion for improper reasons, such as controlling the length of the sentence. "[T]he government's statements at the evidentiary hearing suggest that its motions were limited in scope at least in part . . . to reduce the district court's discretion to depart from the government's notion of the appropriate total sentences . . . . The prosecutor's role in this aspect of sentencing is limited to determining whether the defendant has provided substantial assistance with

respect to 'a sentence,' advising the sentencing court as to the extent of that assistance, and recommending a substantial assistance departure. . . . The desire to dictate the length of a defendant's sentence for reasons other than his or her substantial assistance is not a permissible basis for exercising the government's power under §3553(e)." The court remanded "to permit the government either to file new §3553(e) motions or to provide satisfactory assurance to the district court that its prior motions were based solely upon its evaluation of the Stockdalls' respective substantial assistance."

U.S. v. Stockdall, 45 F.3d 1257, 1260–61 (8th Cir. 1995).

See *Outline* generally at VI.F.3 and 4.

Second Circuit holds that Rule 35(b) motion cannot be denied without affording defendant an opportunity to be heard. Defendant received a §5K1.1 downward departure for substantial assistance. He continued to cooperate after sentencing and the government later made a motion under Fed. R. Crim. P. 35(b) for a further reduction. Before defendant even knew the motion had been filed the district court denied it, stating that defendant's criminal conduct was too serious to permit an even lower sentence. Defendant argued that summary dismissal of the motion without giving him an opportunity to be heard violated Rule 35(b), denied him due process, and was an abuse of discretion.

The appellate court agreed and remanded. The court reasoned that the same process for §5K1.1 motions should be applied to Rule 35(b) because the "only practical difference between" the two motions "is a matter of timing"—one is for substantial assistance before, the other after, sentencing. In §5K1.1 motions "the exercise of discretion requires that the court give the real party in interest an opportunity to be heard. A defendant must have an opportunity to respond to the government's characterization of his cooperation." In light of this, and a defendant's right to challenge the government's refusal to file a §5K1.1 motion in some instances, the court concluded "that just as a defendant may comment on the government's refusal to move under §5K1.1, a defendant should be able to comment on the inadequacy of the government's motion under that section or under Rule 35(b)."

The government argued that defendant's opportunity to be heard at the original sentencing was adequate, but the court disagreed: "The Rule 35(b) motion here concerned events that had not yet occurred at the time of the sentencing hearing in February 1993. Obviously, Gangi did not have an opportunity to be heard at that time as to those events. . . . [F]airness requires that a defendant at least be allowed to comment on the government's motion. . . . We therefore hold that a defendant must have an opportunity to respond to the government's characterization of his post-sentencing cooperation and to persuade the court of the merits of a reduction in sentence. While we rest our decision on the requirements of Rule 35, we recognize that failure to afford an opportunity to be heard would raise grave due process issues. Our holding does not mean that the defendant is entitled to a full evidentiary hearing, as distinguished from a written submission. Whether such a hearing is necessary is left to the discretion of the district court."

U.S. v. Gangi, 45 F.3d 28, 30–32 (2d Cir. 1995).

See *Outline* generally at VI.F.4.

Criminal History

Second Circuit holds that Guidelines do not authorize use of unrelated, uncharged foreign criminal conduct for criminal history departure. Defendant pled guilty to possessing fraudulent alien registration cards. The district court imposed an upward departure—from criminal history category I to IV—on the basis of the government's claims that defendant previously engaged in homicide, terrorism, and drug trafficking while working for the Medellin drug cartel in Colombia, conduct for which he was never charged or convicted.

The appellate court remanded, holding that the Guidelines authorize some consideration of foreign convictions or sentences, but not other alleged criminal conduct. Under §§4A1.1–1.3, the court reasoned, "not even foreign sentences may be used initially in determining the criminal history category, but they may be used, like a [domestic] pending charge, as the basis for an upward departure. In light of these precise provisions as to how charges and foreign sentences may be used, it is significant that nowhere do the Guidelines specifically authorize the use of unrelated, uncharged foreign criminal conduct, or even foreign arrests, for a departure in the criminal history category." The court also concluded that even if §4A1.3(e)'s consideration of "prior similar adult criminal conduct not resulting in a criminal conviction . . . might reasonably be extended to include criminal conduct in a foreign country, a court might properly consider that conduct only if it is 'similar' to the crime of conviction. Chunza's alleged prior acts of homicide, terrorism, and drug trafficking in Colombia are not 'similar' to his possession of false immigration documents in the United States."

U.S. v. Chunza-Plazas, 45 F.3d 51, 56–57 (2d Cir. 1995).

See *Outline* generally at VI.A.1.c.

Mitigating Circumstances

Ninth Circuit holds that whether offense level "overrepresents the defendant's culpability" under Note 16 of §2D1.1 is independent of qualification for §3B1.2 adjustment. Defendants were part of a large cocaine conspiracy and personally delivered 738 and 200 kilograms, respectively, from a stash house to various locations. They pled guilty and argued that they should receive departures under §2D1.1, comment. (n.16), because they had base offense levels above 36 and received §3B1.2 mitigating role adjustments. The district court refused to depart because defendants' offense levels did not overrepresent their culpability in the criminal activity. Defendants argued on appeal that "whether the base offense level referred to in [Note 16's] clause (A) 'overrepresents the defendant's culpability' is determined solely by whether or not the defendant qualifies for a mitigating role adjustment under §3B1.2. In their view, if the defendant qualifies for a minor role adjustment, he also qualifies for a downward departure."

The appellate court disagreed, concluding that "the defendants' reading of Note 16 would make clause (B) irrelevant. For if 'overrepresentation' were satisfied whenever a minor role adjustment was found, there would be no need for a distinct determination of 'overrepresentation.' . . . The issue is whether the original base offense level, set by the amount of the controlled substance the defendant is 'accountable' for under §1B1.3, is commensurate with the defendant's involvement in the crime. . . . In this case the defendants were only charged at a level reflecting drugs that they actually transported or handled. If that established a base level higher than their culpability, the district court could depart downward. We conclude that the district court properly considered various equities and degrees of involvement before it declined to depart downward. Because the district court did not err in its interpretation of Note 16, its discretionary denial of a downward departure is not reviewable."

U.S. v. Pinto, 48 F.3d 384, 387–88 (9th Cir. 1995).

See *Outline* generally at III.B.7 and VI.C.5.a.

Criminal History

Criminal Livelihood Provision

Seventh Circuit holds that proof showing defendant derived requisite amount of income from criminal activity may be indirect. Defendant pled guilty to possession of stolen mail and his criminal record showed a lengthy history of mail theft. He admitted to having a $100 to $150 per day heroin habit and that he stole mail to support his addiction. The government did not present direct evidence that defendant had stolen the equivalent of 2,000 times the hourly minimum wage (approximately $8,500 at the time), the threshold amount for application of §4B1.3, and defendant only admitted to possessing $2,741 worth of stolen mail for the year. However, the appellate court held that the district court properly applied §4B1.3 based on all of the evidence in context. Defendant's own estimates indicated that his "heroin habit required over $8,500 a year. The evidence also showed that Taylor had no legitimate income for the twelve months prior to his arrest, that he held a job for only three months in the prior eleven years, and that he had an extensive history in the mail theft business. This evidence is certainly relevant to the application of this enhancement and, after considering it all in context, the court had no difficulty concluding that Taylor stole the required amount from the mails that year in order to live and feed his drug habit."

U.S. v. Taylor, 45 F.3d 1104, 1106–07 (7th Cir. 1995).

See *Outline* generally at IV.B.3.

Guideline Sentencing Update, vol. 7, no. 7, April 21, 1995
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003